



**MUTUAL LEGAL  
ASSISTANCE PROVIDED BY  
THE UNITED STATES IN  
PROVISIONAL RESTRAINT  
AND CONFISCATION OF  
ILLICIT ASSETS**

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*Money Laundering, Asset Forfeiture  
and International Cooperation*



**No Safe Haven for Criminals or their  
money - - “Follow the Money”**



## Formal Mechanisms of Legal Assistance

- Bilateral Agreements
  - Mutual Legal Assistance Treaties (MLATs)
  - MOUs – Asset Sharing Agreements
  - Case-specific agreements
- Multi-Lateral Agreements
  - UN Conventions (Vienna, Palermo, Terrorist Financing)
  - Other Multi-lateral Agreements (OAS – Inter-American Conventions)

<small>International Asset Forfeiture</small>	<small>International Asset Forfeiture</small>
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## Typical Requests from Foreign Countries to U.S. regarding forfeiture/confiscation

- Open an investigation
- Request bank records and other documents related to the asset
- Freeze, immobilize, or restrain assets
- Request the formal service of process
- Request notification by publication
- Enforce confiscation/forfeiture orders

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## Multilateral Agreements

- Vienna Convention (1988)
- UN Convention for the Suppression of the Financing of International Terrorism (1999)
- UN Convention Against Transnational Organized Crime (Palermo) (2000)
- UN Convention Against Corruption (2003)
- Organization of American States (OAS) Mutual Legal Assistance Treaty

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## Vienna Convention - Drugs

- Ratified by over 175 countries
- Provides for confiscation/forfeiture cooperation
- Requires recognition of member states
- Requires the freezing of drug assets irrespective of what country's drug laws were violated

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## UN Convention for the Suppression of the Financing of International Terrorism

- Funds used for terrorist purposes can be:
  - Identified
  - Detected
  - Frozen/Seized
  - Forfeited

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## UN Convention Against Transnational Organized Crime

- Criminalize most serious offenses
- Make them predicates for money laundering offense
- Provide assistance
  - Tracing assets
  - Freezing assets
  - Seizing assets
  - Forfeiting assets

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## United Nations Convention Against Corruption

- Negotiated January 2002 to October 2003
- Opened for signature December 9, 2003 in Merida, Mexico
- Entered into force on December 14, 2005
- Approximately 150 Parties
- US ratified on October 30, 2006



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## Mechanisms for Gathering Evidence

- Informal
- Formal

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## Informal Mechanisms

- International law enforcement contacts (police to police)
- Financial Intelligence Units (FIUs)  
e.g., FINCEN

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## The Egmont Group of Financial Intelligence Units –106 Member FIUs



### Request for FIU Information


What information do you need from the disclosing FIU?

For what purpose(s) will the information requested be used?

Are there ongoing formal investigations or judicial proceedings?

Do you anticipate asset forfeiture or securement in this case?  
State the amount and type, or nature, of assets involved in this case.

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## Formal Mechanisms

- Mutual Legal Assistance Treaties (Available on the web at: [www.travel.state.gov/mlat.html](http://www.travel.state.gov/mlat.html))
- Multilateral Conventions
- Letters Rogatory

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## Typical Formal Request

- Freeze, immobilize, or restrain assets
- Request bank records and other documents related to the asset
- Request the formal service of process
- Request notification by publication
- Enforce domestic forfeiture orders
- Open an investigation

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## Assistance by U.S. to Foreign Countries to Restrain & Forfeit Property in the U.S.

Like most countries, U.S. has two options:

- filing domestic foreign case (initiating a U.S. forfeiture action)
  - Criminal Forfeiture
  - *In Rem* Forfeiture
  - OR
- enforcing foreign forfeiture/confiscation restraints/seizures/forfeiture orders



U.S. District Court  
Washington, D.C.



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- ***United States Domestic Forfeiture Mechanisms to Provide Assistance***

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### 3 Mechanisms:


- Administrative (no court order)
- Civil (*In Rem*) Judicial
- Criminal Judicial (Indictment or Information)

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## U.S. JUDICIAL FORFEITURE

<u>Non-Conviction</u> <i>In Rem</i> Proceeding	<u>Criminal</u> <i>In Personam</i> Proceeding
<ul style="list-style-type: none"> <li>•Judicial</li> <li>•Executive/Administrative (law enforcement agency)</li> <li>•No conviction required</li> </ul>	<ul style="list-style-type: none"> <li>•Judicial</li> <li>•Must be conviction</li> </ul>



## What is the difference between *in rem* and criminal forfeiture?

- Criminal forfeiture is part of the sentence in a criminal case. It is an *in personam* action, meaning it is against the person (defendant).
- *In Rem* forfeiture is not part of the sentence in a criminal case. It is an action against property itself.





## Criminal Forfeiture





## Criminal Forfeiture (Judicial proceeding)

- Need Personal Jurisdiction (*in personam*) - - defendant must be present for trial & convicted
- **ADVANTAGE**: Government can forfeit criminal's legitimate property if illicit assets cannot be found (substitute assets)



## Criminal Forfeiture


- Because it is *in personam*, only property belonging to the defendant can be forfeited in the criminal case.
- Property belonging to 3<sup>rd</sup> parties can't be forfeited in the criminal case.
- The court can order a money judgment or substitute assets if the property disappears.



## *Criminal Forfeiture in International Cases*

- Restraining orders and repatriation of assets against foreign assets
- Plea agreements
- Extradition requests that seek the return of property
- Enforcement of foreign criminal forfeiture judgments

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- **Presumption in Criminal Forfeiture**
- Unexplained wealth +
- Lack of legitimate income
- = Indication of illegal activity



## REPATRIATION OF PROPERTY

- *21 U.S.C. § 853(e)(4)* – where defendant has placed his forfeitable property beyond the jurisdiction
- District court has express authority to order defendant to repatriate assets
- Sanctions for Non-compliance:
  - Sentence Enhancement for Obstruction
  - Contempt

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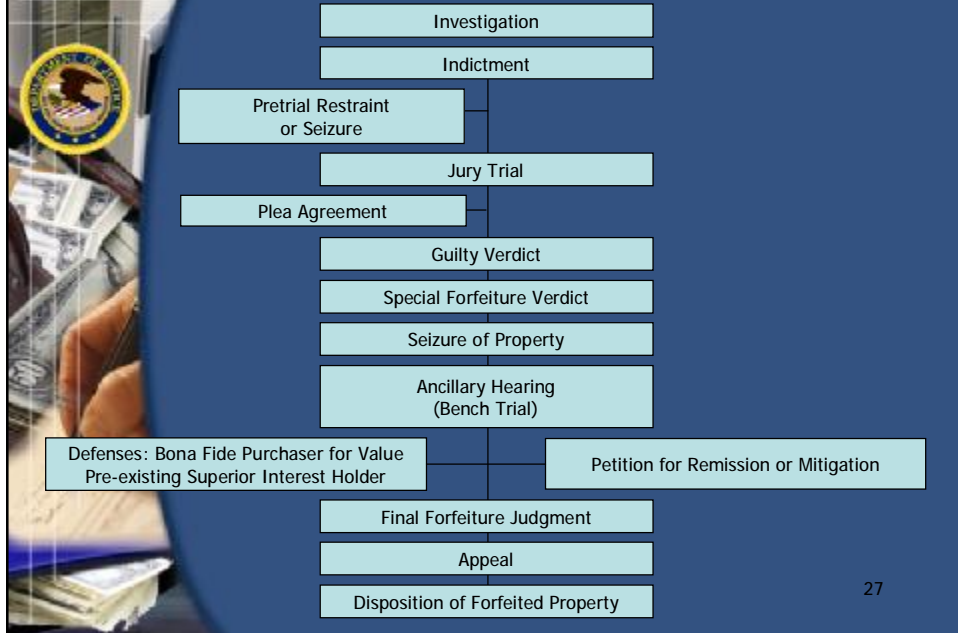
## PLEA AGREEMENTS

**Defendant Should Be Required to:**

- Consent and cooperate in forfeiture
- Execute assignments and/or power of attorney to transfer title
- Repatriate foreign based property
- Liquidate property and surrender proceeds
- Assist foreign government in property disposition or forfeiture

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# CRIMINAL FORFEITURE



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## *In Rem* Forfeiture

- *In Rem* forfeiture is NOT part of a criminal case. *In Rem* forfeiture is a civil action *in rem* against the property itself. The Government proves the property, not the person, was derived from or was used to commit a crime.



## International *in rem* Forfeiture

### Jurisdiction and venue

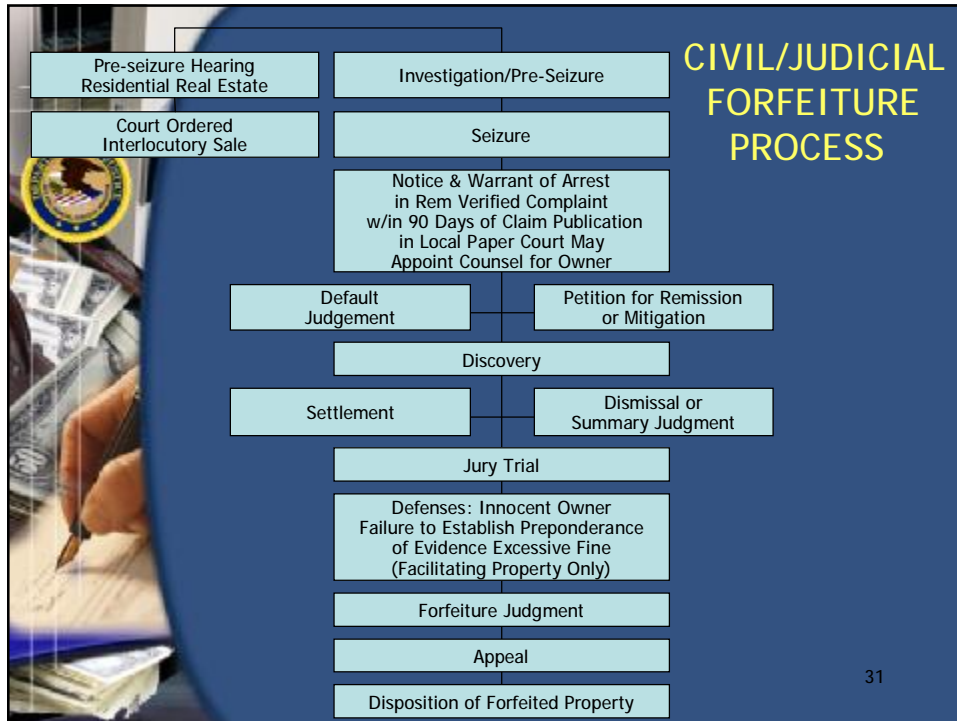
- Must have control over the asset
- Property located beyond U.S. borders can be subject to civil forfeiture, so long as acts giving rise to the forfeiture occurred here. 28 U.S.C. 1355(b)(2)
- Foreign government must agree to seize assets and then honor US forfeiture judgment
- Venue is where acts giving rise to forfeiture occurred, where defendant is found, or where criminal prosecution is brought



## Restraint of property overseas – *in rem* forfeiture

File complaint, obtain civil seizure warrant

- Warrant served on foreign jurisdiction's "central authority" for execution by that country 18 U.S.C. 981(b)(3)
- Request foreign authorities to seize property, provide notice to parties, etc.



## Legal Protections of Property Owners' Rights in the U.S.

- Notice to third persons
- Opportunity to demonstrate innocence
  - **Criminal: Ancillary Hearing**
  - ***In Rem*: within action itself**
  - ***BUT*, if claimant does not appear during specified period, court orders default judgment**



## Proceeds of Crime (SUA)

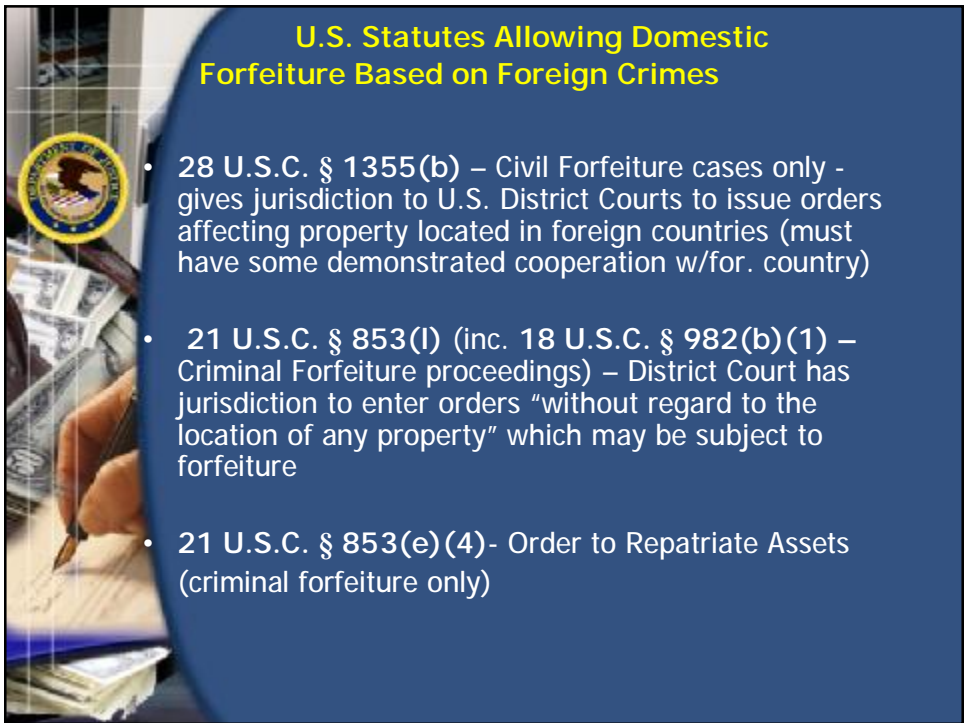


Proceeds also includes  
Traceable Property





## Facilitating Property



### U.S. Statutes Allowing Domestic Forfeiture Based on Foreign Crimes

- 28 U.S.C. § 1355(b) – Civil Forfeiture cases only - gives jurisdiction to U.S. District Courts to issue orders affecting property located in foreign countries (must have some demonstrated cooperation w/for. country)
- 21 U.S.C. § 853(l) (inc. 18 U.S.C. § 982(b)(1) – Criminal Forfeiture proceedings) – District Court has jurisdiction to enter orders “without regard to the location of any property” which may be subject to forfeiture
- 21 U.S.C. § 853(e)(4)- Order to Repatriate Assets (criminal forfeiture only)



## U.S. Forfeiture Assistance Prior to 2000 – Are Still Options

- Pre-Trial Restraining Orders
  - 18 U.S.C. § 981(b)(4)
- Arrested/Charged Abroad
  - *Ex-Parte* 30-Day Freeze to await evidence
- Arrest/Seize on Probable Cause
  - Seizure Warrant
  - Arrest Warrant *in rem*
- No treaty or agreement required
- Need Affidavit from foreign counterparts with sufficient evidence stated to obtain warrants in the U.S.
- Pursue U.S. domestic forfeiture case (generally civilly) to conclusion, then share forfeited property with foreign government



## U.S. Forfeiture Assistance Prior to 2000 – Are Still Options

- 18 USC 981(a)(1)(B) permits an *in rem* action against property in the U.S. – proceeds, derived from, traceable to, an offense against a foreign nation or facilitating property;
- 981(a)(1)(B)(ii) – includes the following foreign crimes punishable for a term exceeding 1 year: crimes of violence including extortion, arson, fraud by or against a foreign bank, public corruption, arms smuggling, trafficking in persons, narcotics, weapons (including nuclear, biological);
- A certified copy of a foreign confiscation order creates a rebuttable presumption of forfeitability;
- 30-day restraint is permitted under 981(4) (may be extended for good cause).



• **ENFORCEMENT OF FOREIGN PROVISIONAL RESTRAINT ORDER OR FINAL FOREIGN CONFISCATION ORDER (since 2000)**

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**Civil Asset Forfeiture Reform Act Included Provision Permitting Enforcement of Foreign Confiscation Judgment (Aug. 2000) 28 U.S.C. § 2467(e)**

- Foreign Offense that would be Forfeitable Federal Violation if Committed in the U.S.
- Treaty or Agreement
- Attorney General Certification
- Criminal and *in rem* Judgments

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## U.S. ENFORCEMENT OF FOREIGN JUDGMENTS OF FORFEITURE

**28 U.S.C. § 2467 (CAFRA-2000)**

- Any foreign offense conduct that would be a forfeitable U.S. "federal" violation if foreign criminal acts were committed in the U.S. Covers more than 200 crimes. Test is conduct based.
- Requires Treaty or other Agreement for Mutual Forfeiture Assistance
- U.S. Attorney General Certification of Foreign Judgment (must be authenticated or certified by issuing Court).
- Covers both foreign Criminal, *in rem* or other Non-Conviction based Confiscation Judgments including a confiscation to pay a sum of money

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## Enforcing Foreign Judgments of Forfeiture/Confiscation

**[28 U.S.C. § 2467(d)(1)]**

- Must be final, non-appealable judgment of forfeiture or confiscation obtained in foreign court (conviction or non-conviction based);
- Foreign proceeding was compatible with "requirements of due process of law";
- Foreign court had personal jurisdiction over defendant;
- Foreign court had subject matter jurisdiction;
- Foreign government took steps to give notice of the proceedings to any person with an interest in the property in sufficient time to assert a defense;
- The judgment was not obtained by fraud;
- Must have certified copy of Judgment or Order.


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## USA PATRIOT Act Included Provision to Enforce Foreign Provisional Restraint Orders (Oct. 2001) 28 U.S.C. 2467(d)(3)

- Register, Enforce Foreign Restraining Order (28 USC 2467(d)(3)(B)(ii)
  - Attorney General Must Certify
  - Treaty or Agreement Required
- Foreign Request (2467(d)(3)(B)(i))
  - Affidavit Describing Foreign Action *and* Reasonable Basis to Believe will be Forfeited
  - Hearing Upon Notice (restraint needed, basis)
  - Treaty or Forfeiture Agreement Required

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## PROVISIONAL MEASURES

### *US Restraint Pending Foreign Proceedings* 28 U.S.C. § 2467(d)(3) (Oct. 26, 2001 – USA PATRIOT Act)

- Register, Enforce Foreign Restraining Order
  - Attorney General must certify, but need not be certified by issuing court
  - Treaty or Forfeiture Agreement required
- Foreign Request (without sending the U.S. a Valid Foreign Restraining Order)
  - Affidavit describing foreign action, including the foreign procedures leading to final forfeiture/confiscation *and* "Reasonable Basis to Believe" that the property will be declared forfeited/confiscated in the foreign country
  - Hearing (restraint needed, basis)
  - Treaty or Agreement required

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## Enforcing Foreign Restraining Orders 28 U.S.C. § 2467(d)(3)




- Based on foreign restraining order (no affidavit needed)
  - Restraining orders **STRONGLY PREFERRED**
- Requires dual forfeitability, treaty or agreement, and Attorney General certification
  - Dual forfeitability = Foreign offense that would be forfeitable federal violation if committed in the U.S.
    - **Does not include Tax Offenses.**
    - **Does not include Capital Flight.**
  - Treaties and agreements = Any agreement that provides for mutual forfeiture assistance including: most MLATs, the Vienna Convention, UNTOC, UNCAC, and UNCSFIT
- Applies to conviction-based & non-conviction-based foreign forfeiture proceedings
- Statute specifically references restraint; however, because it cross-references 18 USC 983(j) [“take any other action to seize, secure, maintain or preserve”], seizure appears to be authorized

## Enforcing Foreign Restraining Orders [28 U.S.C. § 2467(d)(3)(B)(ii)]




- U.S. can enforce Restraining/Seizure Order from Foreign Court of competent jurisdiction;
- Order may specifically identify property in the U.S.;
- Or may restrain all assets belonging to an accused in the U.S.;
- Assistant Attorney General certification must be obtained in advance of filing the Application to enforce the Foreign Order;
- No AAG certification is required if Application is based on Affidavit from the foreign government;
- AAG Certification PLUS Foreign Court Order (translated into English if necessary);
- Application may be filed in U.S. District Court for the District of Columbia, or any district where property or defendant is found 28 USC 2467(c)(2)(B).



## Restraint Without Foreign Order [28 U.S.C. § 2467(d)(3)(B)(i)]


- If proceeding prior to the initiation of a foreign charge, or restraining order being issued, must have Affidavit from foreign official with knowledge of the case;
- Nature of investigation & identity of suspects;
- Offenses being investigated and/or charged;
- Dates of offenses & factual basis for the charges;
- Assets to be restrained (verify bank account numbers);
- Summarize supporting evidence, indicating reliability;
- Reasonable basis to believe that charges will be placed and that the property will be forfeited in the future;
- Foreign statutory citations & summary of the offenses;
- Identify whether assets are proceeds, substitute proceeds, traceable or instrumentalities;
- State due process procedures in foreign country.



## Adverse Ruling in U.S. District Court of the District of Columbia – limits 2467(d)(3) to only final foreign forfeiture orders

- In Re: ANY AND ALL FUNDS OR OTHER ASSETS IN BROWN BROTHERS HARRIMAN & CO. ACCOUNT # 8870792 IN the NAME OF TIGER EYE INVESTMENTS LTD. ;  
Civil Action No. 08-mc-0807 (March 9, 2009), 2009 WL 585808 (D.D.C. 2009)
- Brazilian MLAT request – case in trial court investigatory stage;
- Searches & seizures/temporary detention orders in Brazil
- Initial *ex parte* orders obtained in U.S. 12/30/08 & 1/15/09 based on Brazilian investigator's affidavit
- Emergency Motion to Dissolve *Ex Parte* Orders granted by District Court – appealed by United States
- U.S. Application to Register/Enforce certified Brazilian Restraining Orders denied by District Court – also appealed





## Defenses/Objections

- Interested party may not object to U.S. restraining order on any ground which is subject of the parallel forfeiture proceeding in the foreign country;
- The U.S. district court is bound by the findings of fact as stated in the foreign forfeiture or confiscation order;
- Parties may object based on deficiency of:
  - Service of Notice in the foreign country;
  - Lack of an opportunity to raise a defense;
  - Lack of personal jurisdiction;
  - Lack of subject matter jurisdiction.

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## International Asset Sharing



Proceeds of Assets Forfeited in the U.S. can be Transferred to Cooperating Foreign Governments (DOJ & Treasury regs)

Since 1989, more than \$230 Million in forfeited proceeds has been transferred to 35 countries from the DOJ Fund

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UNITED NATIONS  
*Office on Drugs and Crime*



### Asset sharing provisions in:

1. United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna Convention)
2. United Nations Convention against Transnational Organized Crime (Palermo Convention)
3. International Convention for the Suppression of the Financing of Terrorism.

## INTERNATIONAL ASSET SHARING

Governed by Interagency MOU's

### *MOU'S*

- MOU of 1992 between DOJ, Treasury and State
- MOU of 1995 between DOJ and Treasury

## U.S. Treasury Asset Forfeiture Fund



- Established in 1993 (31 U.S.C. § 9703);
- In 2009, over \$527 million was deposited into the Treasury Forfeiture Fund


## Statutes Permitting International Sharing

18 U.S.C. § 981(i) – prop. forfeited either civilly or criminally under Title 18 may be transferred to foreign government which participated in the forfeiture (3 conditions):

- (1) agreed to by Sec. of State;
- (2) per an agreement bet. US & for. nation (MLAT, executive agreement or case-by-case agreement);
- (3) foreign gov't must be certified under 22 U.S.C. § 2291(h) (maintained by State Dept);

21 U.S.C. § 881(e)(1)(E) – same as above for drug cases;

31 U.S.C. § 9703(h) – same as above for Treasury forfeitures



### *Statutory Conditions*

1. The requesting country must have facilitated either directly or indirectly the seizure or forfeiture of property in the United States
2. The transfer must be authorized by the Attorney General or the Treasury Secretary with concurrence by the Secretary of State

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### *Statutory Conditions*

3. There must be a treaty or agreement between the United States and the recipient country authorizing asset sharing. This can be a case specific agreement, a Mutual Legal Assistance Treaty (MLAT), or an asset sharing agreement
4. If applicable, the country must be one that has been certified under the Foreign Assistance Act


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## Asset Management Issues

- Who is custodian?
- Hiring/vetting of contractors?
- Problems with Real Property
- Interlocutory Sales
  - By court order
  - By representative of defendant
- U.S. MARSHALS SERVICE
- U.S. TREASURY CONTRACTOR - EGG

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